

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL DUANE BRUCE,

Defendant-Appellant.

UNPUBLISHED

August 14, 2008

No. 277216

Calhoun Circuit Court

LC No. 2006-004121-FH

Before: Markey, P.J., and Whitbeck and Gleicher, JJ.

PER CURIAM.

Defendant Michael Bruce appeals of right his jury trial conviction and sentence for resisting and obstructing a police officer.¹ The trial court sentenced Bruce to 18 months to 15 years' imprisonment as a habitual offender, fourth offense.² On appeal, Bruce argues that he was deprived of a fair trial by the prosecutor's inappropriate arguments, that his trial counsel was ineffective for failing to object to the prosecutor's arguments, and that the trial court improperly deprived him of credit for time served in violation of his statutory and constitutional rights. Because we conclude that there were no errors warranting relief, we affirm.

I. Basic Facts And Procedural History

On October 30, 2006, Officer Angel Rivera of the Battle Creek Police Department was dispatched to an address in reference to a fight. When he arrived, he encountered Marsha Dish, Bruce's niece. She indicated that Bruce had already left and that he was intoxicated and had been belligerent with her. According to Officer Rivera, Dish appeared concerned and afraid of Bruce. Dish indicated that Bruce was a white male and that when he left he was riding or pushing a bicycle. Dish did not want to file a formal complaint or have Bruce arrested. Officer Rivera indicated that he would sit in his car in front of Dish's house while he completed his report.

¹ MCL 750.81d(1).

² MCL 769.12.

Several minutes later, while Officer Rivera was sitting in his car, he noticed a man who met Bruce's description pushing a bicycle toward Dish's home. According to Officer Rivera, Bruce appeared to be under the influence of alcohol. Officer Rivera got out of his car and asked Bruce if he could talk to him and if he had any type of identification. Bruce was uncooperative and replied that it was none of Officer Rivera's "fucking business." Bruce repeated this several times. The volume of Bruce's voice kept going up and down. Officer Rivera repeatedly advised Bruce that if he did not lower his voice, he could be arrested for drunk and disorderly conduct. Officer Rivera testified that Bruce was creating a disturbance and was belligerent. Bruce told Officer Rivera his name but refused to provide his middle name or date of birth.

Officer Rivera testified that Bruce continued to be belligerent so Officer Rivera told him that he was under arrest for drunk and disorderly conduct. In addition, Officer Rivera testified that when he tried to grab Bruce's right hand to arrest him, Bruce pulled away from him and they both fell into some shrubbery. Officer Rivera dislocated one of his fingers during the incident. Officer Rivera testified that Bruce repeatedly indicated that he was not resisting. Another police officer, Lieutenant Ray Felix, subsequently arrived and helped Officer Rivera arrest Bruce as Officer Rivera was having difficulty getting one of the handcuffs on Bruce because of Officer Rivera's dislocated finger.

Bruce testified that Officer Rivera did not indicate that he was arresting him for drunk and disorderly conduct. Rather, when Officer Rivera grabbed his arm, his hand came off the hand brake of his bike and the bike started rolling down the hill. According to Bruce, when he tried to reach back and grab the bike before it fell, he and Officer Rivera lost their balance and fell into the shrubbery. Bruce stated that when they were lying on the ground, Officer Rivera told him that he was being arrested for resisting and obstructing. Bruce testified that he did not try to resist Officer Rivera.

Bruce was ultimately charged with resisting and obstructing a police officer causing injury. At the end of the preliminary examination, when considering bond, the trial court inquired:

THE COURT: And what's the situation? Is your client in jail on a parole hold?

MR. WEBB: He – he is on a hold, your Honor.

THE COURT: All right. I'm going to make it a ten percent bond then incase [sic] something changes on that.

II. Prosecutorial Misconduct And Ineffective Assistance Of Counsel

A. Standard Of Review

Bruce argues that he was denied a fair trial by the prosecutor's misconduct during closing arguments. Specifically, Bruce argues that the prosecutor attacked his credibility based on his status as a defendant and bolstered the police officer's credibility based on their status as police officers. In the alternative, Bruce argues that his defense counsel rendered ineffective assistance of counsel when he failed to object to the prosecutor's statements. Because defense counsel failed to object to the prosecutor's statements, we review Bruce's claim for plain error that

affected his substantial rights.³ We will not find error requiring reversal where a curative instruction would have alleviated the prejudicial effect of the alleged misconduct.⁴

The issue whether defense counsel rendered ineffective assistance of counsel is also not preserved for this Court's review.⁵ Therefore, we review the claim based only on the existing record.⁶ To establish ineffective assistance of counsel during trial, a defendant must show that his trial counsel's representation fell below an objective standard of reasonableness under prevailing professional norms; that but for his counsel's errors, there is a reasonable probability that the results of his trial would have been different; and that the proceedings were fundamentally unfair or unreliable.⁷ To establish that his trial counsel's performance was deficient, "defendant must overcome the strong presumption that his counsel's action constituted sound trial strategy under the circumstances."⁸ Effective assistance of counsel is presumed and defendant bears a heavy burden of proving otherwise.⁹

B. The Prosecutor's Statements

During closing arguments, the prosecutor stated:

As our questions indicated to you at the beginning of this trial this is an issue of credibility. If you don't believe Officer Rivera, if you don't believe Lieutenant Felix for the little bit of information that he could provide to you about the injury, then your decision is simple, the defendant isn't guilty beyond a reasonable doubt. But if you do believe them, examine what they have to say as compared to what the defendant has to say. And ask yourself which seems logical, which is more credible. Who in this courtroom who testified has more to gain or lose from their testimony and their truthfulness or lack of truthfulness. Who is here throughout the testimony. How did they look and act when they testified to you. How did they seem to be when answering questions? Were they answering questions or were they putting forth their own agenda?

I submit to you that Officer Rivera and Lieutenant Felix have nothing to gain by this. They were doing their job. They are here today to tell you what their job was like on October 30, 2006 in the evening hours.

³ *People v Thomas*, 260 Mich App 450, 453-454; 678 NW2d 631 (2004).

⁴ *People v Callon*, 256 Mich App 312, 329-330; 662 NW2d 501 (2003).

⁵ *People v Marji*, 180 Mich App 525, 533; 447 NW2d 835 (1989).

⁶ *Id.*

⁷ *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000); *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001).

⁸ *Toma*, *supra* at 302.

⁹ *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004).

The defendant, on the other hand, has a much different stake in this. And if you recall the defendant admitted much what Angel Rivera stated to be accurate from his own fuzzy recollection. Even through [sic] he's confused but he also told you that [he] wouldn't call Angel Rivera a liar.

C. Applying The Standards

A prosecutor is free to argue the evidence and all reasonable inferences from the evidence.¹⁰ A prosecutor may also argue from the facts that a witness is credible.¹¹ “The credibility of a witness is always an appropriate subject for the jury’s consideration” and “[e]vidence of a witness’ bias or interest in a case is highly relevant to credibility.”¹² And “a prosecutor may comment on his own witnesses’ credibility during closing argument, especially when there is conflicting evidence and the question of the defendant’s guilt depends on which witnesses the jury believes.”¹³ There was conflicting evidence in this case. Officer Rivera testified that when he tried to grab Bruce’s hand to arrest him, Bruce tried to pull away from him. Bruce testified that he did not resist Officer Rivera; he was merely trying to stop his bike from rolling down the hill. The prosecutor’s comments as to his own witnesses’ credibility were appropriate. The prosecutor based the argument on the facts and evidence in the case. Moreover, the prosecution did not argue that Bruce was not credible based on the fact that he was a defendant in a criminal case. In context, the prosecutor argued that the jury had to judge credibility and should base its judgment on the facts and circumstances. Further, even if we agreed with Bruce that there was error, the jury was instructed that the attorneys’ statements and arguments were not evidence. Thus, any prejudice was cured.¹⁴ We conclude that there was no plain error warranting reversal.

Moreover, Bruce was not denied the effective assistance of counsel. The prosecutor’s comments were not improper. Counsel is not ineffective for failing to make objections that would be futile.¹⁵ Consequently, defendant has failed to carry his burden of demonstrating ineffective assistance of counsel.

III. Sentencing Credit

A. Standard Of Review

Bruce argues that he should be granted credit toward his sentence in this case for time incarcerated between his arrests and sentencing despite having been on parole. This case

¹⁰ *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995).

¹¹ *People v Unger*, 278 Mich App 210, 236-237; 749 NW2d 272 (2008).

¹² *People v Coleman*, 210 Mich App 1, 8; 532 NW2d 885 (1995).

¹³ *Thomas*, *supra* at 455.

¹⁴ *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003) (“Jurors are presumed to follow their instructions, and instructions are presumed to cure most errors.”).

¹⁵ *People v Milstead*, 250 Mich App 391, 401; 648 NW2d 648 (2002).

requires this Court to consider three statutes. We review de novo the proper interpretation of statutes.¹⁶ However, we review unpreserved issues for plain error affecting the defendant's substantial rights.¹⁷ In proving plain error, the defendant must establish that an error occurred, the error was plain, that is, clear and obvious, and the error affected the defendant's substantial rights by affecting the outcome of the trial court proceedings.¹⁸

Bruce also argues that his state and federal constitutional rights to due process were violated by the trial court's failure to award credit, because the Department of Corrections systematically fails to individualize punishment for parole violations and instead uses an arbitrary system. Challenges under the Fifth and Fourteenth Amendments to the United States Constitution are questions of constitutional law, which we review de novo.¹⁹ However, because the issue was not preserved, this Court reviews for plain error.²⁰

B. Statutory Provisions

This case involves the interplay between three statutes: MCL 769.11b, MCL 768.7a(2) and MCL 791.238(1) and (2). MCL 769.11b states:

Whenever any person is hereafter convicted of any crime within this state and has served any time in jail prior to sentencing because of being denied or unable to furnish bond for the offense of which he is convicted, the trial court in imposing sentence shall specifically grant credit against the sentence for such time served in jail prior to sentencing.

MCL 768.7a(2) states:

If a person is convicted and sentenced to a term of imprisonment for a felony committed while the person was on parole from a sentence for a previous offense, the term of imprisonment imposed for the later offense shall begin to run at the expiration of the remaining portion of the term of imprisonment imposed for the previous offense.

MCL 791.238 states, in pertinent part:

(1) Each prisoner on parole shall remain in the legal custody and under the control of the department. The deputy director of the bureau of field services, upon a showing of probable violation of parole, may issue a warrant for the

¹⁶ *People v Martin*, 271 Mich App 280, 346; 721 NW2d 815 (2006).

¹⁷ *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

¹⁸ *Id.*

¹⁹ *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001).

²⁰ *Carines*, *supra* at 764 (noting that unpreserved claims of constitutional error are reviewed for plain error).

return of any paroled prisoner. Pending a hearing upon any charge of parole violation, the prisoner shall remain incarcerated.

(2) A prisoner violating the provisions of his or her parole and for whose return a warrant has been issued by the deputy director of the bureau of field services is treated as an escaped prisoner and is liable, when arrested, to serve out the unexpired portion of his or her maximum imprisonment. *The time from the date of the declared violation to the date of the prisoner's availability for return to an institution shall not be counted as time served.* The warrant of the deputy director of the bureau of field services is a sufficient warrant authorizing all officers named in the warrant to detain the paroled prisoner in any jail of the state until his or her return to the state penal institution. [Emphasis added.]

C. Legal Standards

In *People v Seiders*,²¹ this Court explained:

When a parolee is arrested for a new criminal offense, he is held on a parole detainer until he is convicted of that offense, and he is not entitled to credit for time served in jail on the sentence for the new offense. MCL 791.238(2). A parole detainee who is convicted of a new criminal offense is entitled, under MCL 791.238(2), to credit applied for time served in jail as a parole detainee, but that credit may only be applied to the sentence for which the parole was granted.

The Court in *Seiders* further noted that a parole detainee is not entitled to credit on the new offense for time spent in jail because “bond is neither set nor denied when a defendant is held in jail on a parole detainer.”²² In *Seiders*, the Court further explained its rationale by stating that to apply MCL 769.11b any other way would “constitute[] an unwarranted expansion of the purpose and intent of the statute because it [would] grant[] credit for time served on a sentence for an offense on which the defendant was not incarcerated before sentencing.”²³

D. Applying The Standards

We are bound by *Seiders*. Consequently, Bruce was not entitled to jail credit. The record is clear that he was being held on parole detainer following his arrest for this offense. We note that the trial court set bond in this case, but only after acknowledging on the record that Bruce was being held on parole detainer. Moreover, it is clear from the record that the trial court only set bond as an alternative in the event that the parole detainer was lifted. Therefore, the possibility of posting bond, at some time in the future if the parole detainer was lifted, did not secure Bruce any rights under MCL 769.11b.

²¹ *People v Seiders*, 262 Mich App 702, 705; 686 NW2d 821 (2004).

²² *Id.* at 707.

²³ *Id.*

E. Due Process

Bruce argues that the trial court violated his state and federal constitutional rights to due process by failing to award credit, because the Department of Corrections systematically fails to individualize punishment for parole violations and instead uses an arbitrary system. Bruce has cited no factual support for this claim or, more importantly, applicable authority to support this proposition. This Court will not search for authority to sustain or reject a party's position and the failure to cite applicable authority in support of an issue results in its being deemed abandoned on appeal.²⁴

Affirmed.

/s/ Jane E. Markey
/s/ William C. Whitbeck
/s/ Elizabeth Gleicher

²⁴ *People v Watson*, 245 Mich App 572, 587; 629 NW2d 411 (2001).